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11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA
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14 UNITED STATES OF AMERICA,) 3:13-cr-00053-HDM-WGC
15 Plaintiff,)
16 vs.) ORDER
17 LESTER ROGER DECKER,)
18 Defendant.)
19 _____)

20 Before the court is the defendant Lester Roger Decker's
21 ("defendant") renewed motion for judgment of acquittal (#119). The
22 government has responded (#120), and defendant has replied (#121).

23 The single-count indictment in this case charged the defendant
24 with aggravated sexual abuse and attempted aggravated sexual abuse
25 in violation of 18 U.S.C. §§ 2241(a), 1151, and 1153. After the
26 government rested, but before the close of evidence, defendant
27 moved for a judgment of acquittal on count one "to the extent that
28 it charge[d] him with Attempted Aggravated Sexual Abuse. . . ."

1 (Doc. #104 (Def. Mot. Judgment of Acquittal at 2)) (emphasis
2 original). The court denied defendant's motion and instructed the
3 jury on both aggravated sexual abuse and attempted aggravated
4 sexual abuse. The court provided the jury with separate verdict
5 forms for each charge.

6 In his renewed motion, defendant argues that instructing the
7 jury on attempted aggravated sexual abuse constructively amended
8 the indictment because the indictment, he argues, did not
9 sufficiently plead attempted aggravated sexual abuse. Defendant
10 also again argues that there was insufficient evidence at trial to
11 sustain his conviction. In his reply, defendant for the first time
12 argues that even if the indictment was not constructively amended,
13 it was improperly duplicitous and therefore must be dismissed.

14 Defendant's argument that the indictment was constructively
15 amended is without merit. As defendant concedes in his reply, the
16 indictment was not required to allege a substantial step in
17 connection with the attempt charge. (Doc. #121 (Def. Reply 4));
18 *United States v. Resendiz-Ponce*, 549 U.S. 102, 106-11 (2007). And
19 in fact, where, as here, the defendant was charged with a completed
20 crime, he still could have been convicted of an attempt to commit
21 the completed crime even if the indictment had not charged him with
22 attempt at all. See *Resendiz-Ponce*, 549 U.S. at 110 n.7; Fed. R.
23 Crim. P. 31(c) ("A defendant may be found guilty of any of the
24 following . . . (2) an attempt to commit the offense charged.");
25 see also *United States v. Iribe*, 564 F.3d 1155, 1161 (9th Cir.
26 2009). Even were this not the case, the indictment here
27 sufficiently alleged the facts and circumstances of attempted
28 aggravated sexual abuse. It alleged that on April 14, 2013,

1 defendant attempted to engage in a sexual act, by use of force,
2 with the victim. The facts and circumstances of the attempt charge
3 are the same as those of the aggravated sexual abuse charge, with
4 the only difference being whether defendant completed the sexual
5 act. Accordingly, the indictment was not constructively amended
6 when the court instructed the jury on attempted aggravated sexual
7 abuse.

8 Defendant's argument about the sufficiency of the evidence is
9 likewise without merit. Viewed in a light most favorable to the
10 government, there was sufficient evidence at trial for the jury to
11 conclude that the defendant was guilty of attempted aggravated
12 sexual abuse.

13 The court finds defendant's argument of duplicity - though not
14 raised in these proceedings until his reply - is also without
15 merit. Any defect of duplicity in the indictment was cured by the
16 court giving the jury separate instructions for the attempted
17 aggravated sexual abuse and the aggravated sexual abuse charges, as
18 well as separate verdict forms for each. *See United States v. Elk-*
19 *Booth*, 481 Fed. App'x 326, 327 (9th Cir. 2012) (unpublished
20 disposition); *see also United States v. Martinez*, 273 F.3d 903, 915
21 (9th Cir. 2001), *overruled on other grounds by United States v.*
22 *Lopez*, 484 F.3d 1186 (9th Cir. 2007) ("[A] defendant indicted
23 pursuant to a duplicitous indictment may be properly prosecuted and
24 convicted if either (1) the government elects between the charges
25 in the offending count, or (2) the court provides an instruction
26 requiring all members of the jury to agree as to which of the
27 distinct charges the defendant actually committed.").

28 Finally, the court finds no merit in defendant's claim that he

1 suffered prejudice because of the way in which the indictment was
2 drafted. Defendant was on notice as early as the time the
3 indictment was returned that the government was charging him with
4 both aggravated sexual abuse and attempted aggravated sexual abuse.
5 The indictment cited the statute, which criminalizes both
6 aggravated sexual abuse and the attempt to do so, and specifically
7 charged the defendant with attempt. In addition, the government's
8 submission of jury instructions on both charges five days before
9 trial placed the defendant on notice of the attempt charge.

10 For all the foregoing reasons, the defendant's motion for
11 judgment of acquittal (#119) is **DENIED**.

12 IT IS SO ORDERED.

13 DATED: This 12th day of February, 2014.

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15 UNITED STATES DISTRICT JUDGE
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